



**US Army Corps
of Engineers®**

ENGINEERING AND CONSTRUCTION BULLETIN

No. 2004-8 Issuing Office: CECW-CE/CEMP-I Issued: 19 Apr 2004 Expires: 19 Apr 2005

Subject: Economic Price Adjustment Provisions – Steel Price Increases

Applicability: Guidance

1. Purpose: The purpose of this bulletin is to provide guidance on use of economic price adjustment (EPA) provisions in new fixed-price construction contracts.
2. Background: We have been investigating the need, potential benefits and risks of various types of EPA provisions that might be appropriate in new construction solicitations to help compensate for current volatility in steel prices. To date, we have not found actual price data (based on bids or proposals received) that justify widespread use of EPA provisions in new construction solicitations. We have anecdotal information of predicted impacts of rising steel prices on bid or proposal prices and certain reports of steel material price hikes on some existing construction contracts. (Note there is no acceptable contractual means to provide financial relief on existing fixed-price construction contracts. When appropriate, per Federal Acquisition Regulation (FAR) clause 52.249-10 Default (Fixed-Price Construction), the contracting officer may grant a time extension for unforeseeable causes beyond the control and without the fault or negligence of the contractor for delays involving delivery of steel products by subcontractors or suppliers at any tier.)
3. We have had discussions with some districts on individual projects that are of long duration and "steel heavy" and for which it is very likely that contractors will have to include significant contingencies that may well render these projects "unawardable" at current estimates. Those offices are giving very serious consideration to using an EPA clause in the solicitation for these projects. Construction, by nature, is an uncertain business. Right now, we see volatility in prices for many different products, in addition to steel, such as strand board, plywood, diesel fuel, lumber, PVC piping, roofing felt, etc. What we have not seen coming from industry spokesmen is an overwhelming level of concern that contractors cannot reasonably estimate the cost of a project that extends for a year or two in duration without including huge contingencies for protection.
4. There are two fundamental approaches used in EPA clauses covered by the FAR. One approach is based on a cost method that compares a baseline cost at award for a commodity/material/labor to an actual invoiced cost. The other approach uses a recognized index (or indices) to establish the basis of a cost increase or decrease from the award price for a particular item (such as certain steel materials identified in the bid schedule). Further, EPA clauses generally include provisions that trigger the consideration of a cost adjustment based on

some minimum percentage of increase or decrease and provide for a maximum percentage cap on the increase.

5. The FAR covers four different types of EPA clauses:

- (1) Established Prices - Standard supplies (clause 52.216-2)
- (2) Established Prices - Semi-standard supplies (clause 52.216-3)
- (3) Adjustments based on actual cost of labor and material. (clause 52.216-4)
- (4) Adjustments based on cost indices. (no clause; we have to make our own.)

DFARS 216.203-4-70 supplements with special clauses for metal products under (1) and (2) above. These are special DFARS clauses for supply contracts that go above and beyond FAR. DFARS 216.2 supplements the FAR 16.102 and tells us the circumstances to use the FAR clauses along with guidance on dollar values, determinations that need to be made, etc. DFARS 216.2 (d), "Adjustments based on cost indexes of labor or material," gives some good guidelines. There is no prohibition in DFARS against using either of FAR clauses (3) & (4) above for services, which would include construction. The clause at (3) would need to be modified appropriately to address only the steel material and not labor issues.

6. The contracting officer's determination of the need for an EPA clause (see FAR 16.203-3) should be based on first-hand evidence (invoices, supply levels etc.) of market volatility in the region, not simply newspaper articles and industry memos. The decision to use EPA provisions must be made on a case-by-case basis in coordination with your customers and other stakeholders on the project delivery team as well as this Headquarters through your Regional Integration Team. We need this coordinated effort to assure consistent application across USACE in our dealings with the construction industry. This should only be pursued on an exception basis, and the limit of cost risk exposure must be assessed to the best of our ability **before** using an EPA clause. Getting construction industry feedback on clause inclusion and language, particularly when using an index-based clause, is highly recommended. (See FAR 15.201, Exchanges with industry before receipt of proposals.) A key decision in using an EPA clause concerns the confidence level of both the industry and our own cost estimators in being able to reasonably estimate costs, often for fairly long term contractual durations, without including exorbitant contingency factors.

7. An EPA clause is intended to mitigate, not eliminate, excessive cost increases. It provides for a more shared risk between the contractor and the Government. With an EPA clause there should be a high probability of a cost increase on a project after award. This means that both USACE and our customers/stakeholders must be prepared to address these cost increases or we are being fiscally irresponsible and will be left with litigation as our last resort. The subsequent cost of claims and the time/resources necessary to defend claims is rarely considered when project funding is appropriated.

8. In conclusion, we believe caution is required when contemplating using an EPA clause. We have discussed this subject with other Federal agencies and see a similar approach being advocated. We will continue to monitor the situation and will assess and revise policy as circumstances dictate.

ECB 2004-8

Subject: Economic Price Adjustment Provisions – Steel Price Increases

9. Point of contact for this bulletin is Mark Grammer, CECW-SAD, 202-761-4108.



DONALD L. BASHAM, P.E.
Chief, Engineering and Construction
Directorate of Civil Works



J. JOSEPH TYLER, P.E.
Chief, Programs Integration
Directorate of Military Programs